Volume 5 | Issue 2 Article 7

1998

Gambling with First Amendment Rights: Playing the Cards Dealt by Valley Broadcasting Co. v. United States

David Jones

GAMBLING WITH FIRST AMENDMENT RIGHTS: PLAYING THE CARDS DEALT BY *VALLEY BROADCASTING CO. v. UNITED STATES*

I. INTRODUCTION

During early colonial times, lotteries, a form of gambling, were just as much a part of American entertainment as movies and football are today.[1] The government often used lotteries to raise revenue for city and state projects.[2] Soon, however, fraud and abuse plagued the American lottery and compelled Congress to impose regulations that crippled the entire industry.[3]

In 1934, Congress enacted the Broadcasting Act as part of the Communications Act of 1934.[4] The Broadcasting Act criminalized

1. *See* DAVID WEINSTEIN & LILLIAN DEITCH, THE IMPACT OF LEGALIZED GAMBLING: THE SOCIOECONOMIC CONSEQUENCES OF LOTTERIES AND OFF-TRACK BETTING 8 (1974). Private lotteries did not carry the same stigma as traditional gambling because the colonists viewed them as a voluntary tax. *See* G. Robert Blakey & Harold A. Kurland, *The Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923, 927 (1978)(citing A. Spofford, Lotteries in American History S. Misc. Doc. No. 57, 52d Cong. 2d Sess. 174-75 (1893)). Thus, both church members and high society were regular participants in the early lottery. *See id.*

2. *See generally* NATIONAL INSTITUTE ON LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, UNITED STATES DEPARTMENT OF JUSTICE, THE DEVELOPMENT OF THE LAW OF GAMBLING: 1776 TO 1976, at 660-63 (1977) (hereinafter DEVELOPMENTS) (discussing state use of lotteries to raise money for universities). Other government projects financed by lotteries included buildings, streets, water systems and fire equipment. *See* WEINSTEIN & DEITCH, *supra* note 1, at 9. Some of the largest lotteries were used in the southern states to raise money for canals, bridges and roads. *See id.* The lotteries were more prevalent in the South than the North primarily because the North developed effective taxing structures early in the Colonial expansion. *See id.*

3. *See* CHARLES T. CLOTFELTER & PHILIP J. COOK, SELLING HOPE: STATE LOTTERIES IN AMERICA 37 (1989). Opposition to lotteries grew fierce during the nineteenth century based on society's belief that they caused abuse and insidious harms. *See id.* One objector decried the lottery as "a practice which opens the door to every species of fraud and villainy." *Id.* *See also* Richard Shawn Oliphant, Note, *Prohibiting Casinos from Advertising: The Irrational Application of 18 U.S.C. § 1304*, 38 ARIZ. L. REV. 1373, 1378-79 (1996) (discussing lottery in Louisiana beset by social problems and abuse).

4. Pub. L. No. 417, ch. 652, § 316, 48 Stat. 1064, 1088 (1934) (current version at 18 U.S.C. § 1304 (1994)). In relevant part, § 1304 of Title 18 provides:

> Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States . . . any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance . . . shall be fined . . . or imprisoned not more than one year, or both.

Id.

the broadcast of lottery information over the radio, an increasingly popular form of entertainment in America.[5] In this Act, however, Congress excepted state lotteries and Indian gaming.[6]

These two exceptions proved to be fatal for the Broadcasting Act in *Valley Broadcasting Co. v. United States.*[7] In *Valley Broadcasting,* two Nevada broadcasting companies wishing to advertise casino gambling on their networks alleged that the Broadcasting Act violated the First Amendment.[8] The government argued that it had the right to regulate commercial advertising, asserting two substantial interests: 1) an interest in reducing the societal ills associated with gambling; and 2) an interest in protecting states that neither permit casino gambling nor wish to receive casino advertising from other states' network signals.[9] The Ninth Circuit held that the regulation unconstitutionally abridged First Amendment speech since the government's stated interests were frustrated by the Broadcasting Act's exceptions.[10]

This Note evaluates the Ninth Circuit's decision to strike down the Broadcasting Act as unconstitutional in light of congressional

5. *See id.* Congress created the Federal Communications Commission (FCC) in 1934 to administratively enforce the Communications Act. *See* 47 U.S.C.A. § 151 (1934) (West 1991). The FCC enacted a similar regulation proscribing lottery advertising on any radio station. *See* 47 C.F.R. § 73.1211 (1986). The FCC regulation provides:

> No licensee of an AM, FM, or television broadcast station . . . shall broadcast any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise or scheme, whether said list contains any part or all of such prizes.

Id. at § 73.1211(a).

6. *See* Pub. L. No. 417, ch. 652, § 316, 48 Stat. 1064, 1088 (1934) (current version at 18 U.S.C. § 1304 (1994)); 18 U.S.C. §§ 1307(a)(1), (b)(1) (1994) (state lotteries); 25 U.S.C. § 2720 (1994) (Indian gaming). The Broadcasting Act also created exceptions for other activities. *See* 18 U.S.C. § 1305 (1950) (non-profit fishing contests); *id.* at § 1307(a)(2) (1988) (non-profit lottery by not-for-profit organization or government organization authorized by the state); *id.* at § 1307(a)(2)(B) (state-authorized lotteries conducted as promotional activity by commercial organization and is ancillary to primary business of that organization).

7. 107 F.3d 1328 (9th Cir. 1997), *petition for cert. filed,* 66 U.S.L.W. 3458 (U.S. Dec. 22, 1997) (No. 97-1047). The court in *Valley Broadcasting* stated that both the Broadcasting Act and its implementing FCC regulation were unconstitutional because of its numerous exceptions. *See id.* at 1336. For a further discussion of the court's holding in *Valley Broadcasting,* see *infra* notes 125-61 and accompanying text.

8. *See id.* at 1330. Casino gambling is a form of a lottery and falls within the ambit of the Broadcasting Act because prizes are awarded by chance. *See* FCC v. American Broad. Co., 347 U.S. 284, 289-91 (1954). For a further discussion of how casino gambling constitutes a lottery, see *infra* note 22.

9. *See Valley Broadcasting,* 107 F.3d at 1331.

10. *See id.* at 1335-36.

policy and past judicial opinion. Section II briefly sets forth the facts surrounding the *Valley Broadcasting* decision.[11] Section III explores the historical and legal background of lotteries, the commercial speech doctrine and other judicial decisions pertinent to the holding in *Valley Broadcasting*.[12] Section IV explains the court's reasoning for invalidating the Broadcasting Act.[13] Section V examines the accuracy of the court's analysis.[14] Section VI considers the impact *Valley Broadcasting* will have on Congress's ability to regulate commercial speech in the future, societal and monetary costs associated with casino gambling and the "major players" involved in the casino industry.[15]

II. FACTS

Valley Broadcasting and Sierra Broadcasting operate television stations in Nevada with network signals reaching parts of California and Utah.[16] The Federal Communications Commission (FCC),[17] an administrative agency that regulates radio and television airwaves, granted both broadcasting companies a license to operate their television stations.[18] Both broadcasters wanted to advertise

11. For a further discussion of the facts in *Valley Broadcasting*, see *infra* notes 16-25 and accompanying text.

12. For a further discussion of the background of commercial lotteries, the commercial speech doctrine and other judicial decisions pertinent to the court's holding in *Valley Broadcasting*, see *infra* notes 26-124 and accompanying text.

13. For a further discussion of the court's analysis, see *infra* notes 125-61 and accompanying text.

14. For a further discussion of the critical analysis, see *infra* notes 162-202 and accompanying text.

15. For a further discussion of the impact the decision will have on the judicial system, individuals affected by casino advertising and the casino industry, see *infra* notes 203-12 and accompanying text.

16. *See* Valley Broad. Co. v. United States, 820 F. Supp. 519, 521 (D. Nev. 1993). Valley Broadcasting serves Las Vegas and southern Nevada and its signals can reach 13,200 residents in Utah, or four percent of Valley's total market. *See id.* Similarly, Sierra Broadcasting serves Reno and northern Nevada and its signals can reach 37,200 California residents, or nineteen percent of Sierra's total market. *See id.*

17. *See* 47 U.S.C.A. § 151 (1994). The purpose of the FCC is to:

> regulat[e] interstate and foreign commerce in communication by wire and radio so as to make available . . . a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities . . . for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority . . . .

Id.

18. *See id.* As originally enacted in 1934, the Broadcasting Act referred only to radio broadcasts. *See* Pub. L. No. 417, ch. 652, § 316, 48 Stat. 1064, 1088 (1934) (amended 1988). The FCC construed the Broadcasting Act to apply to television

commercials related to casino gambling, an activity that is lawful in Nevada but prohibited in both Utah and California.[19] Fearful of criminal and civil prosecution by the FCC under the Broadcasting Act, the broadcasting companies refused to carry these advertisements on their networks.[20]

On May 14, 1992, the broadcasters filed suit in the District Court of Nevada seeking injunctive and declaratory relief.[21] The broadcasters alleged that the Broadcasting Act was an unconstitutional abridgment of their First Amendment rights.[22] The district court granted the broadcasters' motion for summary judgment and held that an absolute ban on proposed gaming advertisements vio-

---

as well as radio broadcasting. *See* Brief for the Appellants at 6, *Valley Broadcasting*, 107 F.3d 1328 (9th Cir. 1997)(No. 93-16191). Congress amended the Broadcasting Act in 1988 to conform to the FCC's interpretation. *See* Charity Games Advertising Clarification Act of 1988, Pub. L. No. 10-625, § 3(a)(4), 102 Stat. 3206 (1988) (codified as amended at 18 U.S.C. § 1304 (1994)).

19. *See Valley Broadcasting*, 820 F. Supp. at 522. The broadcasters wanted to televise commercials promoting casino blackjack, craps, poker, roulette, slot machines and other lawful games of chance. *See id.*

20. *See id.* The FCC administratively enforces the Broadcasting Act and possesses the authority to impose a variety of sanctions, including license revocation. *See* Brief for the Appellants at 6, *Valley Broadcasting*, 107 F.3d 1328 (9th Cir. 1997)(No. 93-16191). The FCC contended that it had an interest in controlling the growth of legalized gambling and furthering the public policies in California and Utah. *See Valley Broadcasting*, 820 F. Supp. at 522. For the Act's pertinent text, see *supra* note 4.

21. *See* Valley Broad. Co. v. United States, 820 F. Supp. 519, 522 (D. Nev. 1993). The district court rejected the government's argument that the broadcasters did not have standing because they were not immediately threatened with prosecution by the government. *See id.* at 524. Rather, the court concluded that standing existed because the government "actively enforces the provisions of [the Broadcasting Act] through the use of fines ranging up to $12,500." *Id.* Therefore, the court held that the broadcasters demonstrated a reasonable threat of injury as a result of the government's enforcement of both the statutory and regulatory provisions because the government had historically found similar unlawful advertisements. *See id.*

22. *See id.* The district court rejected the broadcasters' claim that the Broadcasting Act was not applicable to the facts of the case since it applied to lotteries, as defined differently from casino gambling. *See Valley Broadcasting*, 820 F. Supp. at 524. The district court held that casino gambling was within the meaning of the Broadcasting Act because it met the three essential characteristics of a lottery, gift enterprise or similar scheme. *See id.* (citing FCC v. American Broad. Co., 347 U.S. 284, 289-91 (1954)). These characteristics include: (1) the distribution of prizes; (2) the element of chance; and (3) consideration. *See id.* (citing FCC v. American Broad. Co., 347 U.S. 284, 289-91 (1954)). Applying these elements to the case, the district court concluded that wagering on casino games served as the consideration, receiving money after a successful wager qualified as the prize, and the whole concept of gambling was predicated on chance. *See id. But see* Oliphant, *supra* note 3 (arguing that casino gambling is not lottery and therefore does not fall within scope of Broadcasting Act).

lated the broadcasters' rights to commercial free speech under the First Amendment.[23]

The government sought review of the district court's decision from the Court of Appeals for the Ninth Circuit.[24] The Ninth Circuit held that the Broadcasting Act was unconstitutional because it did not advance the government's interests in: 1) reducing social ills caused by gambling; and 2) protecting California and Utah from unwanted casino advertising.[25]

III. BACKGROUND

The history of American lotteries demonstrates America's qualified acceptance of games involving risk and chance.[26] In the late nineteenth century, the government enacted statutes regulating the advertising of such games.[27] The evolution of constitutional analysis and recognition of commercial free speech by the Supreme Court undermined the legislature's ability to abolish certain modes of advertising.[28] Nonetheless, courts continue to accord state and

23. *See Valley Broadcasting*, 820 F. Supp. at 526-27. The district court concluded that the Broadcasting Act did not sufficiently advance the government's substantial interest in protecting states from unwanted and intrusive casino advertisements. *See id.*

24. *See Valley Broadcasting*, 107 F.3d 1328, 1330.

25. *See id.* at 1336.

26. *See* I. NELSON ROSE, GAMBLING AND THE LAW 1 (1986). The popularity of lotteries has risen and fallen three times in this country. *See id.* Lotteries were first popular during the colonial times to raise funds for various colonial settlements. *See id.* After a brief lull, lotteries were used to help raise funds to rebuild the South after the Civil War. *See id.* After another hiatus spanning 80 years, various states resurrected lotteries in the 1960's as a way to increase their revenue base without taxing their citizens. *See id.* Presently, states are using an assorted variety of games to raise money, including bingo, card rooms, video machines, race-tracks and legal casinos. *See* ROSE, *supra*, at 1-3.

27. *See* 18 U.S.C. § 1304 (1994) (prohibiting broadcast of commercial lottery advertisements); Act of Mar. 2, 1895, ch. 191, 28 Stat. 963 (eliminating interstate lotteries altogether by prohibiting transportation of lottery tickets in interstate or foreign commerce); Anti-Lottery Act of 1890, ch. 908, § 1, 26 Stat. 465 (extending ban on lottery advertising from letters and circulars to include newspapers); Act of July 12, 1876, ch. 186, § 2, 19 Stat. 90 (extending ban on mailings of lottery information to all lotteries, including those chartered by state legislatures); Act of July 27, 1868, ch. 246, § 13, 15 Stat. 196 (criminalizing mailing of any letters or circulars concerning lotteries, gift concerts, or other similar enterprises offering prizes of any kind of any pretext whatsoever).

28. *See* Liquormart, Inc. v. Rhode Island, 116 S.Ct 1495, 1510 (1996) (holding that state's complete statutory ban on price advertising for alcoholic beverages violated First Amendment); Rubin v. Coors Brewing Co., 514 U.S. 476, 491 (1995) (concluding that labeling ban on alcoholic beverages by Federal Alcohol Administration Act violated First Amendment); Hornell Brewing Co. v. Brady, 819 F. Supp. 1227, 1239 (E.D.N.Y. 1993) (holding that government ban of "Crazy Horse" on name of beer violated First Amendment).

federal legislatures the flexibility to enact statutory schemes that impose restrictions on commercial free speech.[29]

A. The History of the American Lottery

Casino gambling, a popular form of entertainment today, is rooted in early American lotteries.[30] American colonies, without a central government, did not have the power to tax citizens and were largely dependent on England for monetary assistance.[31] King James I responded by establishing a specific lottery in England that would help raise funds for the establishment and perpetuation of various colonial settlements.[32] This lottery enjoyed limited success among English citizens because it competed with other lotteries used to fund English projects.[33] As a result, the colonists authorized their own private lotteries to raise the money needed to fund the colonial expansion.[34] Early private lotteries helped establish prominent universities such as Yale, Harvard and Princeton and

29. *See* United States v. Edge Broad. Co., 509 U.S. 418 (1993) (upholding constitutionality of Broadcasting Act); Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 348 (1986) (finding that Puerto Rico regulations that prohibited casino advertising to its citizens did not violate First Amendment); Anheuser-Busch, Inc. v. Schmoke, 101 F.3d 325, 330 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997) (holding that ordinance prohibiting placement of stationary outdoor advertising that advertised alcoholic beverages did not violate First Amendment).

30. *See* DEVELOPMENTS, *supra* note 2, at 678.

31. *See id.*; *see also* JOHN M. FINDLAY, PEOPLE OF CHANCE 11-14 (1986) (discussing role English lotteries played in early colonial life).

32. *See* Ronald J. Rychlack, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 24 (1992) (citing Virginia Charter of 1612, § XVI, reprinted in 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 37, 44 (W. Swindler ed., 1979)). In 1566, Queen Elizabeth organized the first raffle in order to fund harbor improvements. *See* Findlay, *supra* note 31, at 12. In 1612, King James established the Virginia Company of London; a lottery designed to "raise revenue for the benefit and support of the Jamestown settlement." *Id.* Due to the citizens' unfamiliarity with lotteries, the raffle enjoyed limited success. *See id.*

33. *See* FINDLAY, *supra* note 31, at 12. The settlers relied almost exclusively on England's lottery for colonial funds, which only exacerbated British anti-lottery fever. *See* Rychlack, *supra* note 32, at 24. For example, John Smith, an early colonist, noted that the lotteries sustained Virginia's livelihood. *See id.* (citing JOHN SAMUEL EZELL, FORTUNE'S MERRY WHEEL: THE LOTTERY IN AMERICA 23 (1960)). Soon, the British people complained about the lottery's drain on their towns. *See id.* at 12 (citing HARRY B. WEIS & GRACE H. WEISS, THE EARLY LOTTERIES OF NEW JERSEY 1 (1966)).

34. *See* Rychlack, *supra* note 32, at 24-25 (citing Alfred N. King, *Public Gaming and Public Trust*, 12 CONN. L. REV. 740 (1980)). American aristocrats purchased most of the lottery tickets since they thought it was their civic duty to assist colonial expansion. *See id.* at 24 n.82. This appeal to civic duty is still prevalent in today's lotteries. *See id.* For example, Missouri has an advertisement for its state lottery stating that "when you play, your money works for Missouri." *Id.*

fund construction of public streets, buildings and hospitals.[35] Soon, however, reports suggested that lotteries engendered abuse, fraud and crime.[36] In response, colonists prohibited all lotteries established for personal profit.[37]

Before the embers of its fires began to cool, the lottery was resurrected in 1777 by the Continental Congress in order to raise one and a half million dollars to fund the war against Britain.[38] This time, federal and state governments used lotteries to generate revenue, accompanied by a tougher regulatory scheme designed to eradicate fraud and abuse.[39]

The government's use of financial institutions as a tool to pump money into the economy diminished the state lottery's signif-

---

35. *See* CLOTFELTER & COOK, supra note 3, at 32. Between 1746 and the Civil War, lotteries provided funds for 47 colleges and 300 lower schools. *See* Rychlack, supra note 32, at 25-26. Other projects included churches, Masonic halls, libraries and lighthouses. *See* CLOTFELTER & COOK, supra note 3, at 34.

36. *See* Rychlack, *supra* note 32, at 26. In 1721, state assemblies passed laws in an unsuccessful attempt to control the fraud that existed in private lotteries. *See id.* at 26 n.86 (citing Act of July 27, 1721, ch. 411, 1721 N.Y. Col. Laws 124 and Act of Nov. 25, 1747, ch. 856, 1747 N.Y. Col. Laws 227).

37. *See* WEINSTEIN & DEITCH, *supra* note 1, at 8. Colonists were also concerned that merchants who competed for the same public and private projects that lotteries helped to fund were hurt by the lotteries' "unfair competition." *Id.*

38. *See* FINDLAY, *supra* note 31, at 33. In hopes of rallying support for the lottery and the war effort, the Continental Congress stated:

> It is not doubted but every real friend of his country will most cheerfully become an adventurer, and that the sale of tickets will be very rapid, especially as even the unsuccessful adventurer will have the pleasing reflection of having contributed a degree to the great and glorious American cause.

Id.

39. *See generally* Blakey and Kurland, *supra* note 1, at 928 n.12. For example, in 1812, Congress gave the District of Columbia the authority to establish a lottery, but only up to a maximum payoff of $10,000 and only upon congressional approval. *See id.* (citing Act of May 4, 1812, ch. 75, § 6, 2 Stat. 721). Fraud and abuse, nonetheless, continued to plague the District of Columbia lottery. *See id.* As a result, Congress responded again in 1842 by establishing comprehensive penal laws that effectively outlawed the sale of lottery tickets within the District. *See id.* The collective approach taken by the government from the latter 18th century until the early to mid 19th century permitted state governments to establish lotteries, but prohibited unauthorized private lotteries. *See id.* at 927. Two obstacles prevented states from abolishing these types of lotteries: the contract clause in the Constitution, and the inability of the states to prevent lottery advertisements from crossing their borders. *See* Blakey and Kurland, *supra* note 1, at 928 n.12. In 1819, the Supreme Court held that a state could not impair the obligation of existing contracts. *See* Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 624 (1819). As a practical matter, states could not interfere with existing lotteries but could prohibit the authorization of new ones. *See id.* The states overcame the second obstacle by way of federal legislation prohibiting interstate advertising. *See* Act of July 27, 1868, § 13, 15 Stat. 196 (1868).

icance.[40] In addition, the fraud and abuse that plagued the lottery system in the past resurfaced.[41] In the mid-19th century, Americans were calling for social reform.[42] This time, however, the protests had more popular appeal.[43] Never missing an opportunity to express the popular sentiments of their constituents, politicians condemned lotteries as "schemes of deception to allure the laborious poor from the path of honest industry."[44] Politicians, however, did not stop at general condemnation, and in 1868, Congress enacted a statute prohibiting citizens from depositing any materials concerning lotteries or similar schemes into the mail.[45]

Twenty-two years later, under pressure from President Harrison to abolish any and all remaining lotteries, Congress passed the Anti-Lottery Act of 1890.[46] The Anti-Lottery Act banned the transmission of all lottery information through the United States mail.[47] In 1934, more than forty years later, Congress passed the Broadcasting Act, a descendant of the Anti-Lottery Act, which criminalized the broadcast of commercial lotteries and casino gambling advertis-

---

40. *See* WEINSTEIN & DEITCH, *supra* note 1, at 87; *see also* FINDLAY, *supra* note 31, at 41 (1986) (noting that sophistication of raising capital by state and federal banks diminished lotteries' significance).

41. *See* Rychlack, *supra* note 32, at 40-43. Most notably, in 1868, the Louisiana Lottery authorized one of the biggest lotteries in the nation known as "The Serpent." *See id.* at 40. "The Serpent" generated approximately $13 million of profits annually with a payoff of about $3 million ever year. *See id.* Because a gambling syndicate ran the lottery, its reputation was suspect. *See id.* Consequently, many different civic and religious groups called for its elimination. *See id.* at 43.

In addition, a New York grand jury found that a total of 52 lotteries per year were operating in the United States, which had a damaging effect on the nation's morals and character. *See* A.R. SPOFFORD, LOTTERIES IN AMERICAN HISTORY, S. Misc. Doc. No. 57, 52d Cong., 2d Sess. 194-95 (1893) (Annual Report of the American Historical Society).

42. *See* DEVELOPMENTS, *supra* note 2, at 513 (noting pressure on Congress to act against lotteries).

43. *See id.* Between 1880 and 1885, the Congressional Record revealed a large number of petitions asking for the elimination of the Louisiana Lottery. *See id.* at 513 n.28.

44. Message from Governor Lincoln to the Senate and House of Representatives, Feb. 12, 1833, in ch. 24, 1833 Mass. Acts 332, 333.

45. *See* Act of July 27, 1868, ch. 246, 15 Stat. 194 (1868). This act also allowed for the free return of non-deliverable mail, created postal money orders and discounted the price of postage stamps sold to vendors. *See id.* §§ 1, 2, 12.

46. *See* Act of Sept. 19, 1890, ch. 908, § 1, 26 Stat. 465 (current version at 18 U.S.C. § 1302 (1988)).

47. *See id.* The Act provides in part: "[w]hoever knowingly deposits in the mail . . . any letter . . . or circular concerning any lottery, gift enterprise, or similar scheme . . . [s]hall be fined . . . or imprisoned . . . ." *Id.* The Supreme Court rejected a First Amendment challenge to this act. *See Ex parte* Rapier, 143 U.S. 110, 135 (1892).

ing.[48] After the enactment of the Broadcasting Act, lotteries were obsolete for more than thirty years.[49] In the 1960s, however, states resurrected lotteries to generate revenue for expansive social programs and failing school systems.[50]

B. The History of Commercial Free Speech

The regulation of entertainment, such as laws regarding casino and lottery advertising, necessarily implicates a person's right to free speech. The First Amendment makes it clear that Congress is prohibited from abridging the freedom of speech.[51] Through the latter half of this century, however, the Supreme Court did not apply the First Amendment to commercial speech.[52] For example, in 1942, the Court upheld a law that banned the distribution of printed advertisements in public areas by stating that the Constitution did not restrain the government from prohibiting pure commercial advertising.[53] Instead, the Supreme Court reasoned that

48. *See* 18 U.S.C. § 1304 (1994). When Congress passed the Communications Act of 1934, it also added the Broadcasting Act of 1934, ch. 652, § 316, 48 Stat. 1064, 1088 (1934).

49. *See* WEINSTEIN & DEITCH, *supra* note 1, at 15.

50. *See id.* (noting that New Hampshire was among first states to adopt legal lottery to help raise revenue for schools and local needs); *see also* DEVELOPMENTS, *supra* note 2, at 680-84 (discussing how states used lotteries to raise money as "painless tax"). In response to the increase of state-sponsored lotteries, Congress enacted a statute to exempt state lotteries from the Broadcasting Act. *See* 18 U.S.C. § 1307 (1994). 18 U.S.C. § 1307(a) provides in part:

> The provisions of section 1301, 1302, 1303, and 1304 shall not apply to an advertisement, list of prizes, or other information concerning a lottery conducted by a State acting under the authority of State law which is either:
>
> A) contained in a publication published in that State or in a State which conducts such a lottery; or
>
> B) broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery . . . .

Id.

51. The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

52. *See* Valentine v. Chrestensen, 316 U.S. 52, 55 (1942) (stating that there are no constitutional restraints with respect to commercial advertising). *See generally* Breard v. City of Alexandria, 341 U.S. 622, 645 (1951) (holding that ordinance banning sale of products door-to-door did not violate plaintiff's First Amendment rights).

53. *See Valentine*, 316 U.S. at 54. In *Valentine*, a Florida citizen sued the police commissioner, asserting his right to pass out handbills advertising a submarine for sale to the public. *See id.* at 53. The front side of the handbill contained commercial advertising. *See id.* The back side of the handbill contained a statement protesting the city's refusal to let the citizen dock and advertise his submarine at a city

the Constitution accorded the legislature the absolute right to determine whether, and to what extent, commercial advertising is allowed.[54]

Ten years later, the Court tempered the government's absolute right to regulate all types of advertising, including casino gambling and lotteries.[55] In *Bigelow v. Virginia*, the plaintiff, an editor of a newspaper in Virginia, was convicted of violating a Virginia statute that prohibited abortion clinic advertising.[56] The editor argued that the statute was unconstitutional because it violated his First Amendment rights.[57] The Supreme Court agreed and held that while advertising may be subject to a reasonable regulation that serves a legitimate public interest, it cannot be stripped of all First Amendment protection.[58]

In 1980, the Supreme Court further narrowed the boundaries of legislative prerogative vis-a-vis commercial advertising when it decided *Central Hudson Gas & Electric Corp. v. Public Service Comm'n.*[59] In *Central Hudson*, an electric company argued that its First Amendment rights were violated because it could not advertise or promote electricity.[60] The defendant, a public service company (Commission) in New York, stated that its advertising prohibition was intended to reduce the demand for energy use so New York residents

---

wharf. *See id.* The police commissioner said that he would allow the Florida citizen to distribute the side of the handbill containing the protest statement but not the side containing the commercial speech. *See id.* The Florida citizen argued he had a constitutional right to distribute both sides of the handbill. *See Valentine*, 316 U.S. at 53. The Supreme Court disagreed. *See id.* at 54.

54. *See id.* The Court stated: "[w]e are . . . clear that the Constitution imposes no such restraint on government . . . [with respect to] commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets . . . are matters for legislative judgment." *Id.*

55. Bigelow v. Virginia, 421 U.S. 809 (1975).

56. *See id.* at 814. The advertisement informed women about a New York hospital that performed inexpensive abortions. *See id.* at 812. The statute stated: "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor." *Id.*

57. *See id.*

58. *See Bigelow*, 421 U.S. at 825. The Court held that a state, under its internal police powers, cannot bar a citizen of another state from disseminating information about an activity that is legal in that state. *See id.* at 824-25. This decision, however, had limited applicability to commercial speech since the Court stressed that the advertisement contained information about the availability of abortions, an activity regulated under the Fourteenth Amendment's concept of personal liberty. *See* DONALD E. LIVELY ET. AL., Constitutional Law Cases, History, and Dialogues 791 (1996).

59. 447 U.S. 557 (1980).

60. *See id.* at 559.

would have enough supply to last through the winter months.[61] The Court held that the Commission's regulation unconstitutionally abridged the electric company's First Amendment rights.[62] In arriving at its decision, the Supreme Court developed a four-part inquiry known as the *Central Hudson* test to analyze the constitutionality of a statute that purports to regulate commercial speech.[63] To meet the first prong of the *Central Hudson* test, the communication must be neither misleading nor related to unlawful activity.[64] Second, the government must assert a substantial interest to be achieved by its restrictions on commercial speech.[65] Third, the government must demonstrate that its regulatory scheme directly advances its substantial interest.[66] Finally, the regulation must not be more extensive than necessary to serve that interest.[67] The statute failed the fourth prong of the test because it prohibited all advertising of electricity, regardless of the advertisement's impact on en-

61. *See id.* The Commission issued two orders based on different findings that the commission used to justify its regulation. *See id.* The Commission based its first order, proscribing the electric company from advertising, on its finding that the New York utility system did not have sufficient fuel resources for the winter months. *See id.* The second order was made after the fuel shortage had eased. *See Central Hudson*, 447 U.S. at 559. Rather than lifting the advertising ban, the Commission elected to extend it. *See id.* The electric company challenged this order and the Supreme Court subsequently invalidated it. *See id.*

62. *See id.* at 571. While both Justices Brennan and Blackmun concurred in the *Central Hudson* judgment, they disagreed with the majority's conclusion that commercial speech was given less protection than other speech. *See id.* at 572 (Brennan, J., concurring). Blackmun stated that "[p]ermissible restraints on commercial speech have been limited to . . . fraudulent, misleading, or coercive sales techniques. Those designed to deprive consumers of information about products or services that are legally offered for sale consistently have been invalidated." *See Central Hudson*, 447 U.S. at 574. (Blackmun, J., concurring). *See also* Board of Trustees v. Fox, 492 U.S. 469, 477 (1989) (stressing that commercial speech enjoys limited measure of protection, "commensurate with its subordinate position in the scale of First Amendment values"); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 772 (1976) (holding that consumer has right to uninhibited flow of commercial information).

63. *See Central Hudson*, 447 U.S. at 564.

64. *See id.*

65. *See id.* The Commission asserted two substantial interests: energy conservation and reducing energy costs borne by New York consumers. *See id.* at 568-69. The Court held that both government interests were substantial. *See id.*

66. *See Central Hudson*, 447 U.S. at 569. The Court held that the Commission's advertising prohibition did not advance its interest in reducing consumer costs. *See id.* Rather, the Court agreed with the electric company's argument that its advertising, which encouraged consumers to save money by shifting its consumption to off-peak hours, would reduce overall costs to private citizens. *See id.* at 568. The Court concluded, however, that the Commission's prohibition on advertising did advance its second interest in energy conservation. *See id.* at 569. The Court found a correlation between advertising and demand for electricity. *See id.*

67. *See Central Hudson*, 447 U.S. at 569-70.

ergy use.[68] Further, the Court noted that the Commission did not empirically demonstrate that a less restrictive regulation would not advance its interest.[69]

The *Central Hudson* test remains the only conclusive test used to determine whether the regulation of commercial speech is constitutional.[70] Recently, however, the Court made it easier for the government to meet the fourth prong of the test.[71] Now, the regulation supporting the government interest does not have to be narrowly drawn; rather, the government only needs to show a reasonable fit between the legislature's ends and the means chosen to accomplish those ends.[72]

C. A Loose *Central Hudson* Analysis: Giving Legislatures Flexibility

In theory, the *Central Hudson* test imposed greater restrictions on commercial speech regulation, which included limitations on casino and lottery advertising. In practice, the legislature could continue to prohibit commercial speech so long as it asserted a reasonable justification. Two Supreme Court cases, one involving the regulation of casino gambling advertisements and the other involving the regulation of state lottery advertisements, demonstrate the extent of the Court's legislative deference.[73]

---

68. *See id.* at 570. The Court reasoned that the energy conservation rationale could not justify suppressing information about electric devices or services that would cause no net increase in total energy use. *See id.*

69. *See Central Hudson*, 447 U.S. at 570. The Court suggested that the Commission could use less restrictive measures such as previewing advertisements by the electric company to ensure they would not undermine energy conservation. *See id.* at 571 n.13.

70. *See generally* Edenfield v. Fane, 507 U.S. 761, 776 (1993) (using Central Hudson test to find that ban on in-person solicitation by CPAs who use truthful, nondeceptive information violated First Amendment); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 479 (1988) (applying *Central Hudson* test to conclude that state could not categorically prohibit lawyers from soliciting legal business); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985) (using *Central Hudson* test to evaluate regulations affecting attorney conduct); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983); Association of Nat'l Advertisers, Inc. v. Lungren, 44 F.3d 726, 736 (9th Cir. 1994) (applying *Central Hudson* test to statute regulating environmental advertisements); Securities & Exch. Comm'n. v. Wall Street Publ'g Inst., 851 F.2d 365, 372 (D.C. Cir. 1988) (declining to apply *Central Hudson* test to regulation of newspaper articles).

71. *See* Board of Trustees v. Fox, 492 U.S. 469 (1989).

72. *See id.* at 470.

73. *See* United States v. Edge Broad. Co., 509 U.S. 418 (1993); Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986).

In *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*,[74] the Supreme Court examined the constitutionality of Puerto Rico's Games of Chance Act of 1948 (Chance Act).[75] The Chance Act legalized certain forms of casino gambling to promote the development of tourism.[76] The same Act prohibited casinos from advertising to residents of Puerto Rico.[77] Puerto Rico stated that its regulation attempted to reduce local demand for casino gambling by residents in Puerto Rico, thereby decreasing harmful effects on their health, safety and welfare.[78] The Court concluded that this interest was substantial.[79] The Supreme Court further surmised that the Chance Act advanced Puerto Rico's substantial interest since the Act was enacted under the reasonable belief that the proscription on advertising would reduce local resident participation in gambling.[80] Otherwise, the Court reasoned, Puerto Rico would

74. 478 U.S. 328 (1986).

75. *See id.* at 330-31.

76. *See id.* at 328. The statute provided:

> [T]he purpose of the [Chance Act] is to contribute to the development of tourism by authoriz[ing] . . . certain games of chance which are customary in the recreation places of the great tourist centers of the world, and by . . . establish[ing] . . . regulations . . . in order to ensure for tourists the best possible safeguards, while at the same time opening for the Treasurer of Puerto Rico an additional source of income.

P.R. LAWS ANN. Title 15, § 70 (1972).

77. *See Posadas*, 478 U.S. at 331. This Act provides in part:

> No concessionaire, nor his agent or employee is authorized to advertise the gambling parlors to the public in Puerto Rico. The advertising of our games of chance is hereby authorized through newspapers, magazines, radio, television and other publicity media *outside* Puerto Rico subject to the prior editing and approval by the Tourism Development Company of the advertisement to be submitted in draft to the Company.

P.R. LAWS ANN. Title 15, § 76a-1(7) (1972), *reprinted in Posadas*, 478 U.S. at 332-33 (emphasis added).

78. *See Posadas*, 478 U.S. at 341. In particular, the Puerto Rico legislature was concerned about the moral decline of its citizens and the growth of prostitution, corruption and organized crime. *See id.*

79. *See id.* at 341 (1986). The Court noted that Puerto Rico wanted to prevent the same insidious effects that motivated most American states to prohibit casino gambling. *See id.*

80. *See id.* at 341-42. The casinos challenged the advertising restrictions as underinclusive because Puerto Rico permitted advertising for other kinds of gambling, like horse racing, cockfighting and the lottery. *See Posadas*, 478 U.S. at 342. The Court rejected this argument, stating that the legislature's interest was not necessarily to reduce demand for all games of chance, but to reduce demand for casino gambling. *See id.* The Puerto Rico legislature felt that horse racing, cockfighting and the lottery were a traditional part of its culture and historically did not create the same kind of risks associated with casino gambling. *See id.* The Court deferred to the Puerto Rico legislature's judgment regarding which games created the adverse affects that Puerto Rico was attempting to eliminate via the Chance Act. *See id.*

not have litigated the case all the way to the Supreme Court.[81] Finally, the Court concluded that the restrictions on commercial speech were no more extensive than necessary to serve the government's interest because of the advertising prohibition's narrow scope.[82] To be sure, the purpose behind Puerto Rico's Chance Act was to increase tourist, and not resident, participation in casino gambling.[83] Therefore, the Court held that the legislation was narrowly drawn because it only proscribed casino gambling advertisements directed to Puerto Rican residents.[84]

Moreover, in *United States v. Edge Broadcasting Company*,[85] a television broadcaster challenged the constitutionality of the Broadcasting Act.[86] In *Edge*, a broadcasting company was licensed to operate in North Carolina although the majority of its radio audience lived in Virginia.[87] The broadcasting company desired to broadcast the

81. *See id. But see* Felix H. Kent, *A Significant First Amendment Decision*, 215 N.Y.L.J. June 21, 1996, at 3 (suggesting that Court paid lip service to *Central Hudson* when it accepted Puerto Rico's belief, without any empirical evidence, that casino gambling among local residents would create harmful effects).

82. *See Posadas*, 478 U.S. at 342. The Court also concluded that because the legislature possessed the power to prohibit gambling altogether, it necessarily had the power to enact legislation which only regulated casino gambling. *See id.* at 345. In the Court's view, the greater power to completely ban gambling included the lesser power to ban advertising of casino gambling. *See id.*

83. *See id.*

84. *See id.* at 342. The Court also rejected the casino's argument that the challenged advertising restrictions are constitutionally defective under Bigelow v. Virginia. *See Posadas*, 478 U.S. at 345. In *Bigelow*, the Court struck down a statute as an unconstitutional violation of first amendment commercial free speech because it prohibited the advertisement of abortion clinics. *Bigelow*, 421 U.S. at 829. The Court distinguished *Posadas*, reasoning that *Bigelow* involved advertising restrictions on abortions, which were protected under the fourteenth amendment and could not have been proscribed by the state. *See Posadas*, 478 U.S. at 345. In *Posadas*, however, the legislature could have prohibited gambling altogether. *See id.* Consequently, the Court concluded that the greater power to completely ban casino gambling necessarily includes the lesser power to ban casino gambling advertising. *See id.* at 345-46. Several subsequent Supreme Court decisions, however, have called this reasoning into question. *See, e.g.*, United States v. Edge Broad. Co., 509 U.S. 418 (1993). The Court in *Edge* declined to hear the argument that the greater power to ban the whole activity includes the lesser power to ban the advertising of such activity. *See id.* at 425. Instead, it chose to analyze the constitutionality of the statutes using the *Central Hudson* test. *See id.* Furthermore, in Rubin v. Coors Brewing Co., 514 U.S. 476 (1995), the Court suggested that the "greater power" argument by the Court in *Posadas* was superfluous because it was reached only after the statutes in question passed muster under the *Central Hudson* test. *See id.* at 482 n.2.

85. 509 U.S. 418 (1993). For an extensive discussion of the decision in *Edge*, see Laura V. Schiller, Note, *The Lottery in United States v. Edge Broadcasting Co.: Vice or Victim of the Commercial Speech Doctrine*, 2 VILL. SPORTS & ENT. L.F. 127 (1995).

86. *See Edge*, 509 U.S. at 424. For a further look at the language of the Broadcasting Act, see *supra* note 4.

87. *See Edge*, 509 U.S. at 423-24.

Virginia lottery despite the fact that North Carolina was a non-lottery state.[88] The broadcaster argued the Broadcasting Act was unconstitutional as it applied to his company since the Act prohibited the broadcast of lottery advertising in a state that prohibits lotteries, while at the same time allowing the broadcast of lottery advertising in states that permit lotteries.[89]

Using the *Central Hudson* test, the Court upheld the Broadcasting Act as constitutional.[90] First, the Court concluded that the broadcaster in *Edge* did not air misleading advertisements about the Virginia lottery.[91] Second, the Court found that the government's interest in protecting state choice was substantial.[92] According to the Court, the government had an interest in protecting both the policies of pro-lottery states and anti-lottery states.[93]

The third prong of the *Central Hudson* test involves a consideration between the legislature's ends and the means chosen to accomplish those ends.[94] Accordingly, the Court reasoned that a statute has to be narrowly tailored so the substantial governmental interest

88. *See id.* at 424. The FCC licensed "Power 94" in Elizabeth City, North Carolina, which is approximately three miles from the Virginia border. *See id.* at 423-24. About 92.2% of "Power 94's" listeners lived in Virginia, and 95% of its revenues came from Virginia sources. *See id.* The company claimed that it had lost large sums of money because it could not carry Virginia lottery commercials on its station. *See id.*

89. *See Edge*, 509 U.S. at 424.

90. *See* United States v. Edge Broad. Co., 509 U.S. 418, 425 (1993). The government argued that gambling is a vice product and implicates no constitutional right because a state can prohibit lotteries altogether. *See id.* Therefore, the government urged the Court not to proceed with a constitutional analysis under the *Central Hudson* test. *See id.* The Supreme Court did not feel it had to address this issue since the Broadcasting Act passed constitutional muster using the stricter *Central Hudson* analysis. *See id.*

91. *See id.* at 426.

92. *See* Edge, 509 U.S. at 426. Interestingly, the Supreme Court has consistently recognized the validity of a state's substantial interest. *See* 44 Liquormart Inc. v. Rhode Island, 116 S. Ct. 1495, 1509 (recognizing state interest in reducing alcohol consumption); Rubin v. Coors Brewing Co., 514 U.S. 476, 484 (1995) (finding state interest in suppressing alcohol strength wars); Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341 (1986) (holding that interest in reducing resident participation in casino gambling is substantial state interest); City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 54 (1986) (recognizing city's substantial interest in preserving quality of life in community).

93. *See Edge*, 509 U.S. at 426. North Carolina, for instance, enacted a statute that criminalized the participation and advertisement of any kind of lottery. *See id.* at 423 (citing N.C. Gen. Stat. §§ 14-289, 14291 (1986 and Supp. 1992)). Virginia, on the other hand, legalized state lotteries and had "entered the marketplace vigorously." *Id.*

94. *See id.* at 427. Courts have characterized this third test using different wording, but this different language does not change the basic message of the third prong of the *Central Hudson* test: "[t]he legislation must directly advance the legislature's interest." *Central Hudson*, 447 U.S. at 569.

would be effectively promoted by the regulation.[95] The Court held that because Congress intended the Broadcasting Act to be applied on a national level, it directly advanced the government interest in supporting the policies of both anti-lottery and pro-lottery states.[96] For example, the anti-gambling policy of North Carolina, a non-lottery state, would be furthered because broadcasters licensed in the state would be foreclosed from airing lottery advertisements that could be heard by its residents.[97] Likewise, Virginia's policies would be furthered since broadcasters licensed in Virginia could advertise lotteries, even though network signals may travel deep into North Carolina.[98] Therefore, Congress intended to protect a state's choice under the Broadcasting Act only to the extent the state had the power to issue or withhold a broadcasting license.[99]

The Court analyzed the last *Central Hudson* factor in light of the Act's constitutionality as applied to the broadcaster.[100] The Court held that there must be a reasonable fit between the restriction on the broadcaster and the government's asserted interest.[101] The Court had little problem in concluding that the fit was reasonable, noting that the broadcaster chose to license itself in North Carolina, a non-lottery state.[102] The Court suggested that the broadcaster must move only three miles to Virginia, where he could

95. *See* United States v. Edge Broad. Co., 509 U.S. 418, 427 (1986). The Court rejected the broadcaster's argument that the third prong of the *Central Hudson* test should be applied as to a single entity or person. *See id.* Instead, the Court concluded that this question should be reserved for analysis under the fourth prong of the *Central Hudson* test. *See id.*

96. *See id.* at 428. The Court also noted that the government could have prohibited the advertisement of lotteries in the whole country notwithstanding states that legalized lotteries. *See id.*

97. *See Edge*, 509 U.S. at 428. Both the district and the appellate court concluded that the Broadcasting Act failed under the third prong of the *Central Hudson* test. *See id.* at 427. The district court noted that the 127,000 North Carolina citizens within the broadcaster's range were inundated with Virginia newspapers, television and radio. *See id.* These North Carolina citizens, consequently, were exposed to lottery information coming out of Virginia. *See id.* Therefore, the district court held that the Broadcasting Act was ineffective. *See id.*

98. *See Edge*, 509 U.S. at 428.

99. *See id.*

100. *See id.* at 429. The broadcaster maintained that the Broadcasting Act was unconstitutional as it applied to him because 95% of his advertising revenue came from Virginia sources, which included large sums of money derived from lottery advertisements. *See id.* at 424.

101. *See id.* at 429 (citing Board of Trustees v. Fox, 492 U.S. 469, 480 (1989)).

102. *See Edge*, 509 U.S. at 429. The Court suggested that the fit between the regulation and the restriction would still be reasonable as applied to the broadcasters even if the advertisements reached only a small number of residents in North Carolina. *See id.*

legally advertise Virginia's lottery.[103] The Court further reasoned that if it did allow the broadcaster to advertise while licensed in North Carolina, its decision "would be in derogation of the substantial federal interest in supporting North Carolina's laws making lotteries illegal."[104]

D. *Central Hudson* Strictly Applied: Scrutinizing Legislative Judgment

Recently, the Court abandoned the legislative deference it adopted in *Posadas* and *Edge.* Instead, the Court suggested it will closely examine the legislative reasons behind statutes which regulate commercial speech.[105] Two cases in particular, both involving the regulation of liquor advertisements, illustrate the Court's change in philosophy.[106]

In *Rubin v. Coors Brewing Company,* the Court used the *Central Hudson* test to invalidate a federal statute that prohibited beer labels from displaying alcohol content.[107] The plaintiff, a brewing company, argued it had a First Amendment right to disclose alcohol content on its bottles.[108] The government believed it had a right to prohibit content disclosures because it had a substantial interest in curbing alcohol "strength wars" between brewers.[109] These "strength wars" purportedly aggravated alcoholism and its at-

103. *See id.* at 429.

104. *Id.* The Court also applied its reasoning from *Ward v. Rock Against Racism,* 491 U.S. 781 (1989) to the holding in *Edge. See Edge,* 509 U.S. at 430. The Court held that while *Ward* involved time, place or manner restrictions, it was still applicable because both cases regulated commercial speech. *See id.* The Court explained that under a *Ward* analysis, a regulation is narrowly tailored if it promotes a substantial government interest that would be achieved less effectively absent the regulation so long as it did not substantially restrict more speech than necessary to advance the government's legitimate interests. *See id.* (citing *Ward,* 491 U.S. at 799). The Court further stated that the constitutionality of a regulation is measured by its relation to the overall problem the government seeks to correct. *See id.* (citing *Ward,* 491 U.S. at 801). It is not measured by the extent that it advances the government's interest in an individual case. *See id.* (citing *Ward,* 491 U.S. at 801).

105. *See, e.g.,* Kent, *supra* note 81, at 3 (suggesting that commercial speech regulation is carefully scrutinized by Court).

106. *See* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).

107. 514 U.S. 476, 482. The Bureau of Alcohol, Tobacco and Firearms (ATF) implemented regulations consistent with the Federal Alcohol Administration Act, 27 U.S.C. § 201, which prohibited the disclosure of alcohol content on beer labels. *See Rubin,* 514 U.S. at 481.

108. *See Rubin,* 514 U.S. at 483.

109. *See id.*

tendant social costs.[110] While the Court agreed the government's interest was substantial, it held that the regulation did not advance this interest because there were too many statutory exceptions.[111] These exceptions led to what the Court called an "irrational regulatory scheme."[112] For instance, the statute banned the disclosure of alcohol content on beer labels while at the same time allowing, and in some cases requiring, wines and spirits to contain statements of alcohol content on their labels.[113] Moreover, the government allowed beer companies to advertise alcohol content in states that do not affirmatively prohibit such advertising.[114] The Court, therefore, concluded that these exceptions frustrated the government's interest in defeating strength wars.[115]

Similarly, the Supreme Court refused to give the state legislature the total freedom to regulate commercial speech in *44 Liquormart v. Rhode Island.*[116] In *Liquormart*, the plaintiff challenged a Rhode Island statute prohibiting advertisement of liquor prices.[117] The Supreme Court held that the Rhode Island statute violated the First Amendment because it failed the third and fourth prongs of the *Central Hudson* test.[118] The plurality concluded that while the government's interest in promoting temperance was substantial, the regulation did not directly advance this interest because the government did not proffer any evidence suggesting that the regu-

110. *See id.* The government asserted a second substantial interest. *See id.* at 485. It argued that 27 U.S.C. § 201 gave states the ability to regulate alcohol under the Twenty-First Amendment. *See id.* The Court concluded that even if the government had the authority to facilitate state powers, the government offered nothing to indicate that states need federal assistance to regulate alcohol. *See Rubin*, 514 U.S. at 486.

111. *See id.* at 486.

112. *Id.* at 488.

113. *See id.* at 483. If wine contained more than 14% of alcohol, the government required disclosure of the alcohol content on labels. *See id.*

114. *See Rubin*, 514 U.S. 488 (citing 27 C.F.R. § 7.50 (1994)). At the time *Coors* was decided, only 18 states prohibited the disclosure of alcohol content. *See id.*

115. *See id.* The Court further noted that brewers were allowed to disclose alcohol content in advertisements. *See id.* The Court suggested that the failure to prohibit this type of advertising did not make sense if the government's true goal was to defeat alcohol "strength wars." *See id.*

116. 116 S. Ct. 1495, 1501 (1996). The Court obtained a majority opinion with respect to only two conclusions. *See id.* at 1515. First, all the justices agreed that the Rhode Island statute was unconstitutional. *See id.* Second, a majority of the justices agreed that the Twenty-First Amendment, which gave the States the power to prohibit the use of alcoholic beverages, did not release Rhode Island from the duties under the First Amendment. *See id.* at 1514.

117. *See id.* at 1503.

118. *See Liquormart*, 116 S. Ct. at 1502.

lation would significantly decrease the level of alcohol consumption.[119] Moreover, the regulation was too broad and did not serve the government's interest in reducing alcohol consumption.[120] For example, the legislature narrowly tailored, without unduly restricting, alternative forms of regulation such as educational campaigns against drinking, excise taxes on alcohol and a limitation of per capita purchases.[121]

In sum, the *Central Hudson* test still remains the only definitive test to determine the constitutionality of commercial speech.[122] Recently, the Supreme Court has applied this test rigorously by scrutinizing the legislative reasons supporting the commercial speech restriction.[123] This means that the legislature must demonstrate,

---

119. *See id.* at 1509. The government argued that a prohibition on price advertising would keep alcohol prices at a higher level than they otherwise would be in a free market. *See id.* These high prices would in turn decrease demand. *See id.* The Court agreed that common sense would indicate that a price advertising prohibition will lessen competition and keep prices at a higher level than if there was no ban at all. *See id.* The Court, however, disagreed with the government's conclusion that its ban would promote temperance. *See Liquormart*, 116 S. Ct. at 1509. The Court suggested that while there is some evidence showing that the state's price ban would reduce consumption among casual drinkers, the "[s]tate has presented no evidence to suggest that its speech prohibition would *significantly* reduce market-wide consumption." *Id.* Additionally, the Court concluded that the evidence gleaned from the record indicated that the abusive drinker would typically be undeterred by a moderate price increase. *See id.* at 1510.

120. *See id.*

121. *Id.* at 1510. The state argued that its regulation should be given heightened deference for the following reasons: a) its decision to ban alcohol was a "reasonable judgment" under the *Central Hudson* analysis delineated in *Posadas*; b) it could ban outright the sale of alcoholic beverages; and c) alcohol is a vice product. *See Liquormart*, 116 S. Ct. at 1510-11. Four justices on the Court disagreed with Rhode Island's first argument, stating that they believed *Posadas* erred in giving the legislature total discretion to choose suppression of commercial speech over a less-restrictive policy. *See id.* at 1511. The Court also disagreed with the second argument of the state, reasoning that prohibiting speech can be more intrusive than banning conduct. *See id.* The Court rejected the last argument of the state, suggesting that a "vice" exception to commercial speech protection would be too broad and impossible to define. *See id.* at 1513-14.

122. See *supra* note 70 and accompanying text. One justice, however, has proposed to eliminate the *Central Hudson* test altogether. *See Liquormart*, 116 S. Ct. at 1515. (Thomas, J., concurring). Justice Thomas believes that *Central Hudson* should not be applied to cases where the government's asserted interest is in keeping legal users of a product or service ignorant. *See id.* at 1516. Justice Thomas does not believe commercial speech is any less inferior than noncommercial speech that receives full First Amendment protection. *See id.* at 1520.

123. *See Liquormart*, 116 S. Ct. at 1511. The plurality stated that while commercial speech cases recognize some room for the exercise of legislative judgment, "*Posadas* clearly erred in concluding that it was up to the legislature to choose suppression over a less speech-restrictive policy." *Id.*

with specific evidence, that its statute will advance its governmental purpose.[124]

IV. NARRATIVE ANALYSIS

In *Valley Broadcasting Co. v. United States*, the Court of Appeals for the Ninth Circuit affirmed the district court's decision that a federal ban on broadcast advertisements of casino gambling violated the First Amendment.[125] Justice O'Scannlain, writing for the court, held that the Broadcasting Act was unconstitutional under the third prong of the *Central Hudson* test.[126] The appellate court concluded that the Broadcasting Act contained too many exceptions and frustrated the government's asserted interests.[127]

The Ninth Circuit began by briefly examining the history of commercial speech.[128] The court noted that commercial speech is afforded less protection than other constitutionally protected expression.[129] Accordingly, the court invoked the *Central Hudson* test to determine the Broadcasting Act's constitutionality.[130]

---

124. *See Liquormart*, 116 S. Ct. at 1509 (stating that state bears burden of showing that its regulation will advance its interest "to a material degree.")

125. 107 F.3d 1328, 1336 (9th Cir. 1997).

126. *Valley Broadcasting*, 107 F.3d at 1328.

127. *See id.* The FCC enacted similar regulations under the authority Congress delegated to them in the Communications Act of 1934. *See* 47 C.F.R. § 73.1211 (1997). The court concluded that the language of 47 C.F.R. § 73.1211 was substantially identical to the Broadcasting Act and thus treated them identically. *See Valley Broadcasting*, 107 F.3d at 1330 n.1. The FCC can impose administrative sanctions for violating the Broadcasting Act, including license revocation. *See* 47 U.S.C. §§ 312(a)(6), 503(b)(1), 503(b)(2)(A) (1997).

128. *See Valley Broadcasting*, 107 F.3d at 1330. Before reaching the issue of commercial speech, the court first discussed the history of American lotteries, culminating with the enactment of the Broadcasting Act. *See id.* at 1329. The court briefly discussed all of the major acts that regulated lotteries up until the enactment of the Broadcasting Act. *See id.* For a further discussion of the legislative history underpinning the American lottery, see *supra* notes 26-50 and accompanying text. The court further noted that the legislature had amended the Broadcasting Act on several occasions, granting exceptions to several different organizations. *See Valley Broadcasting*, 107 F.3d at 1330. For a further discussion of the exceptions in the Broadcasting Act, see *supra* note 4.

129. *See Valley Broadcasting*, 107 F.3d at 1330; *see also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-73 (1976) (suggesting that certain types of restrictions are tolerated in commercial speech because of its unique nature).

130. *See Valley Broadcasting*, 107 F.3d at 1330. The broadcasters asked the court to use the strict scrutiny standard, instead of the less rigid standard delineated in *Central Hudson*. *See id.* at 1331 n.3. The broadcasters alleged that the Broadcasting Act was a content-based regulation and required a higher standard than commercial speech. *See id.* The court declined this request because it was uncertain if the holding in *R.A.V.* extended to regulations restricting commercial speech. *See id.*

Both parties conceded the first prong of the test and agreed the commercial speech at issue was neither illegal nor misleading.[131] Attempting to meet the second prong of the *Central Hudson* test, the government asserted two substantial interests.[132] First, the government stated that it had an interest in reducing participation in commercial lotteries.[133] It argued that if it reduced participation, it would necessarily reduce the societal ills associated with commercial lotteries.[134] Second, the government argued that it had an interest in protecting states which proscribe gambling by "regulating interstate activities such as broadcasting that are beyond the powers of the individual states to regulate."[135]

The court found the government's first interest valid.[136] In support of its conclusion, the court alluded to the President's Commission on Organized Crime, which showed a nexus between organized crime and licensed casinos.[137] Additionally, the court cited *Posadas de Puerto Rico Associates v. Tourism of Puerto Rico*[138] as further support, noting that the Supreme Court had "no difficulty in concluding that the Puerto Rico Legislature's interest in health, safety, and welfare of its citizens constituted a substantial government interest."[139] The court also agreed that the government's second interest in protecting states from unwanted casino advertising was substantial.[140] The court reasoned that the federal government

131. *See id.* at 1330.

132. *See id.* at 1331.

133. *See id.*

134. *See id.* at 1331-32. For a further discussion of the social ills caused by casino gambling, see *infra* notes 207-12 and accompanying text.

135. *Valley Broadcasting*, 107 F.3d at 1332.

136. *See id.* at 1332. The Ninth Circuit noted that the district court incorrectly concluded that the government failed to prove this interest. *See id.* The district court rejected this interest because the government did not present any specific evidence to show that commercial lotteries, including casino gambling, caused societal ills. *See id.* The district court mistakenly applied a level of strict scrutiny to the reasons supporting its interest. *See id.* at 1331. The Ninth Circuit applied a "substantial" interest test rather than the "compelling" interest test which required a more relaxed, intermediate scrutiny to its restrictions on commercial speech. *See Valley Broadcasting*, 107 F.3d at 1331 (citing Association of Nat'l Advertisers, Inc. v. Lungren, 44 F.3d 726 (9th Cir. 1994)).

137. *See id.* at 1332. While agreeing with the first interest proffered by the government, the court noted that the government's submissions were not very extensive and that organized crime had decreased steadily since the advent of tougher crime control. *See id.*

138. 478 U.S. 328 (1986).

139. *See Valley Broadcasting*, 107 F.3d at 1332. The court supported its conclusion with the opinions in both *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993) and *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986).

140. *See Valley Broadcasting*, 107 F.3d at 1333. The district court recognized this interest as substantial. *See* Valley Broad. Co., v. United States, 820 F. Supp. 519,

must be able to regulate broadcast signals that cannot be contained within state borders because individual states are powerless to control interstate broadcasts.[141] Absent such legislation, states that prohibit casino gambling will have no effective means to protect their residents from unwanted casino advertising, and the government's anti-gambling policies would be compromised.[142]

The court, however, held that the Broadcasting Act undermined both governmental interests.[143] Using the language in *United States v. Edge Broadcasting Co.*,[144] the court required the government to show a "fit between the restriction that is not necessarily perfect, but reasonable."[145] The government had to demonstrate "to a material degree" that its regulations would in fact reduce the societal ills associated with gambling and protect states which are unable to regulate casino gambling advertisements.[146] The court, however, reasoned that the numerous exceptions found in the Broadcasting Act frustrated the government's stated interests.[147] Relying upon the Supreme Court's recent decision in *Rubin v. Coors*

525 (1993). However, the government felt slighted by the lower court's characterization of its interest. *See Valley Broadcasting*, 107 F.3d at 1331. The district court concluded that the government's interest was in protecting state choice. *See Valley Broadcasting*, 820 F. Supp. at 526. Rather, the government characterized its choice, and the Ninth Circuit agreed, as "protecting those states that choose not to permit casino gambling." *Valley Broadcasting*, 107 F.3d at 1331. This alleged mischaracterization was pivotal because the district court held that the divergent public policies of each state with respect to gambling only remotely furthered the government's interest in protecting state choice. *See Valley Broadcasting*, 820 F. Supp. at 519.

141. *See Valley Broadcasting*, 107 F.3d at 1333 (citing Champion v. Ames, 188 U.S. 321 (1903)(recognizing state's choice to prohibit lotteries when it gave Congress authority to prohibit transportation of lottery tickets)).

142. *See id.* In reaching its conclusion, the court reasoned that its decision did not conflict with the language in *Edge*. *See id.* The court stated that *Edge* stood for the proposition that it is not unconstitutional to protect states which prohibit lotteries from lottery advertising even if it means prohibiting advertising in states which sponsor lotteries. *See id.*

143. *See id.* at 1333-34.

144. 509 U.S. 418 (1993).

145. *Valley Broadcasting*, 107 F.3d at 1333-34 (citing United States v. Edge Broad. Co., 509 U.S. 418, 429 (1993)).

146. *See id.* at 1334. The court briefly discussed the Supreme Court's decision in *Liquormart*. *See id.* Recognizing that none of the rationales in *Liquormart* provided any binding precedent, the court stated: "the government's asserted interest in reducing demand for casino gambling seems less likely to succeed following the [*Liquormart*] decision." *Id.*

147. *See id.* The Broadcasting Act recognized advertising exceptions for the following organizations: state lotteries, fishing contests, not-for-profit lotteries, promotional lotteries conducted by an organization so long as it is ancillary to the organization's primary purpose, and gaming activities pursuant to the Indian Gaming Regulatory Act. *See* 18 U.S.C. § 1304 (1994).

Brewing Co.,[148] the court concluded that the government's regulatory scheme was irrational.[149] The court took special note of one exception found in the Broadcasting Act that allowed Indian Tribes to advertise anywhere in the United States.[150] The court reasoned that it was difficult to understand how the government's desire to decrease public participation in casino gambling was materially advanced when it allows casinos run by Indian reservations to advertise on any station and in any state.[151]

The court's next obstacle was to reconcile its opinion in light of analogous facts in *Posadas*, which gave Puerto Rico the right to prohibit casino advertisements.[152] The court distinguished *Posadas* by suggesting that the Puerto Rico legislature narrowly defined its interest as reducing local resident demand for casino gambling.[153] In contrast, the government's interest in *Valley Broadcasting* was broadly defined as reducing the participation in *all* commercial lotteries.[154] Therefore, the court concluded that the Broadcasting Act's exceptions would "without doubt undermine this broad interest."[155] In addition, the court stated that the Broadcasting Act would be unconstitutional even if the government recast its interest as the reduction of public participation in casino gambling.[156] The court stated, "[h]ere, unlike *Posadas*, the [Broadcasting Act] contains an exception even for casino gambling—casinos operated by Indian Tribes pursuant to the terms of the Indian Gaming Regulatory Act."[157]

---

148. 514 U.S. 476 (1995).

149. *See Valley Broadcasting*, 107 F.3d at 1335. For a further discussion of the facts and holding in *Coors Brewing*, see *supra* notes 107-15 and accompanying text.

150. *See Valley Broadcasting*, 107 F.3d at 1335.

151. *See id.*

152. *See id.* The court noted that the plurality in *Liquormart* questioned *Posadas's* blanket deference to the legislature's interests underlying the regulation. *See id.* In a concurring opinion in *Liquormart*, Justice O'Connor stated, "[t]he closer look that we have required since *Posadas* comports better with the purpose of the analysis set out in *Central Hudson*, by requiring the State to show that the speech restriction directly advances its interest and is narrowly tailored." *Id.* (O'Connor, J., concurring).

153. *See Valley Broadcasting*, 107 F.3d at 1335.

154. *See id.*

155. *Id.* at 1335-36.

156. *See id.*

157. *Id.* at 1336. *Posadas* allowed broadcasters in Puerto Rico to advertise horse racing, cockfighting and the Puerto Rico lottery. *See* Posadas De Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 342 (1986). For a further discussion of the Court's analysis of *Posadas*, see *supra* notes 74-84 and accompanying text.

Additionally, the court surmised that the same exceptions undermining the government's first interest also frustrated its second interest in protecting states that cannot regulate the interstate transmission of broadcasting.[158] For example, under this statutory scheme, states that proscribe gambling cannot prevent Indian casino advertising from reaching its citizens.[159] In addition, the court noted that the government did not demonstrate, with specific evidence, that Indian gaming would not undermine the Broadcasting Act's interest in protecting states from unwanted casino advertising.[160] Consequently, the government failed to demonstrate that its regulation would advance its asserted harms to a "material degree" as required by past Supreme Court decisions.[161]

V. CRITICAL ANALYSIS

The conclusions and holding of the court in *Valley Broadcasting* controvert congressional policy and Supreme Court precedent. First, the Ninth Circuit erred when it concluded that the government successfully asserted a substantial interest in protecting states from unwanted casino advertising.[162] The policies underlying the Broadcasting Act demonstrate that the government should not prohibit broadcasters from advertising in states where they are licensed.[163] Here, the broadcasters were licensed in Nevada. Thus, the government disregarded congressional policy by preventing the broadcasters from advertising casino gambling in Nevada based on a substantial interest in "protecting states [like California and Utah] from unwanted casino gambling."[164] Second, the court incorrectly held that the Broadcasting Act was unconstitutional because the ex-

158. *See Valley Broadcasting*, 107 F.3d at 1336.

159. *See id.*

160. *See id.* (citing Edenfield v. Fane, 507 U.S. 761, 771 (1993)).

161. *See id.* Because the Broadcasting Act failed to advance the government's stated interests, it did not have to reach the fourth and final prong of the *Central Hudson* test. *See id.*

162. *See* H.R. REP. NO. 93-1517 (1974) *reprinted in* 1974 U.S.C.C.A.N. 7007 (permitting broadcasters to advertise lotteries as long as they are licensed in state where lotteries are legal); United States v. Edge Broadcasting, 509 U.S. 418, 427-29 (1993) (stating that broadcasters can advertise lotteries in states where they are authorized, even if network signals spill over into states where they are prohibited).

163. *See Edge*, 509 U.S. at 428 (stating congressional policies underlying Broadcasting Act allow broadcaster to advertise in states where they are licensed).

164. *See Valley Broadcasting*, 107 F.3d at 1328. The broadcasters, citing the Court's decision in *Edge*, argued that the lower court erred in finding that the government had a substantial interest in protecting non-casino states from interstate casino advertising. *See id.* at 1333. The Ninth Circuit disagreed, reasoning that the Court in *Edge* provided protection for non-lottery states at the expense of lottery states. *See id.*

ceptions given to Indian gaming and state lotteries undermined the government's interest in reducing the adverse effects associated with casino gambling.[165] Rather, Congress allowed for these exceptions because evidence shows that state lotteries and Indian gaming, unlike casino gambling, do not cause abuse and crime.[166]

A. The Government Does Not Have a Substantial Interest in Protecting States from Unwanted Casino Advertising

Before reaching the question of whether the government's interests were advanced by the Broadcasting Act, the court concluded that both interests were substantial under the *Central Hudson* test.[167] The Supreme Court, however, rejected the government's interest in protecting states from unwanted casino advertising.[168] In *United States v. Edge Broadcasting*,[169] the Court stated that the policies underlying the Broadcasting Act clearly showed Congress' intent to support the polices of both anti-lottery and pro-lottery states.[170] The Supreme Court concluded that broadcasters could advertise a lottery *only* if licensed in a state that sponsors a lottery.[171] Furthermore, the Court suggested that this right continued even if network signals spilled over into states that proscribed lotteries.[172] While the facts in *Edge* involved the broadcasting of state-sponsored lotteries and not casino gambling, the reasoning is nevertheless applica-

165. *See id.* at 1335. The court noted that the legislature amended the Broadcasting Act on several occasions to exempt numerous organizations from its advertising prohibition. *See id.* at 1333. While the court believed all of these exemptions had the collective effect of undermining the purpose behind the Broadcasting Act, the court was particularly concerned with the exemptions given to Indian Tribes and state lotteries. *See id.*

166. *See* CLOTFELTER & COOK, *supra* note 3; DEVELOPMENTS, *supra* note 2, at 655-70 (1977).

167. *See Valley Broadcasting*, 107 F.3d at 1333.

168. *See* United States v. Edge Broad. Co., 509 U.S. 418, 428 (1993).

169. *Id.* at 428.

170. *See id.* The Court noted that Congress, if it desired, could have prohibited all state lottery advertising. *See id.* Rather than choosing this option, Congress gave states the freedom to prohibit lottery advertising by withholding licenses from the broadcasters. *See id.*

171. *See Edge*, 509 U.S. at 428. The Court further said that a state that allows lottery advertising could still constitutionally prohibit its advertising. *See id.* Thus, Nevada could withhold an advertising license from a broadcaster licensed in Nevada even though casino gambling activity is legal in Nevada. *See id.*

172. *See id.* The Court suggested that it does not matter how deep the signals reach into a non-lottery state. *See id.* Conceivably, a broadcaster located on the border of two states could legally transmit all of its signals into a non-lottery state as long as he is licensed in a state that sponsors a lottery. *See id.* In *Edge*, however only 7.8% of the broadcaster's listening audience lived in North Carolina, a non-lottery state. *See Edge*, 509 U.S. at 423.

ble to *Valley Broadcasting*.[173] In *Valley Broadcasting*, both broadcasters were licensed in Nevada.[174] Thus, because Nevada has legalized casino gambling, they should be permitted to advertise casino gambling even if their signals spill over into California and Utah.[175] Conversely, California and Utah have the right to prevent a broadcaster licensed in their respective states from advertising casino gambling because both states have enacted laws that prohibit this activity.[176] Under no circumstances, however, can the government use the Broadcasting Act to bar any of these states from recognizing their policy either supporting or prohibiting casino gambling advertising.[177] Consequently, by concluding that the government has an interest in protecting California and Utah, the court erroneously disregarded the policy of Nevada.[178] The Ninth Circuit, however, correctly concluded that the government had a

---

173. The government argued that this distinction was crucial. *See* Brief for the Appellants at 25, *Valley Broadcasting*, 107 F.3d at 1332 (9th Cir. 1997) (No. 93-16191). It reasoned that the congressional policies underlying the regulation of state-lottery advertisements were different than those underlying casino gambling. *See id.* California and Utah, both anti-gambling states, would thus be able to prevent any casino gambling signals from reaching its citizens, even if the broadcaster was licensed in Nevada. *See id.* This argument, however, ignores the Supreme Court's decision in *Edge*, which did not make a distinction between a state's policy on gambling advertising and its policy on state-lottery advertising. *See Edge*, 509 U.S. at 428. In *Edge*, the Court stated: "Congress opted to support the *anti-gambling* policy of a state like North Carolina . . . [while] at the same time . . . not [interfering] with the policy of a lottery-sponsoring State such as Virginia." *Id.* at 427. (emphasis added).

174. *See Valley Broadcasting*, 107 F.3d at 1330. "A license is required for the operation of a radio broadcasting station. The power to license is within the exclusive jurisdiction of the Federal Communications Commission." C.J.S. *Telegraphs, Telephones, Radios, and Television* § 302 (1954).

175. *See* Act of Mar. 19, 1931, ch. 99, Nev. Laws 165 (authorizing casino gambling).

176. *See* Cal. Penal Code § 330 (West 1987). Section 330 provides that "[e]very person who deals, plays . . . with cards, dice, or any device, for money, checks, credit . . . and every person who plays or bets at or against any of those prohibited games, is guilty of a misdemeanor, and shall be punishable by a fine . . . or by imprisonment . . . ." *Id.* Similarly, Utah's statute prohibiting gambling states, "the Legislature shall not authorize any game of chance, lottery or gift enterprise under any pretense or for any purpose." UTAH CODE ANN. § 27 (West 1953).

177. *See Edge*, 509 U.S. at 428. The Nevada legislature, in a statement of public policy, concluded that the casino gambling industry is vital to its economy and the welfare of its citizens. *See* NEV. REV. STAT. ANN. § 463.0129 (Michie 1955). On the other hand, Utah's policy on advertising gambling is evidenced by the following remarks of Senator Hatch of Utah: "Solutions to [the] problems of [gaming advertising] must be found without subjecting the people of non-gaming states to a barrage of unwanted advertising." S. REP. NO. 537, at 11-12 (1984).

178. *See generally* H.R. REP. No. 93-1517 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7007.

substantial interest in reducing participation in casino gambling and its accompanying social ills.[179]

B. The Broadcasting Act Was Not Unconstitutional Under the Third Prong of the *Central Hudson* Test

While the Broadcasting Act withstood the second prong of the *Central Hudson* test, the court held that it failed the third prong of the test because the Act contained too many exceptions.[180] The court believed that the government's objective, reducing participation in commercial lotteries, was undermined because Indian tribes and state lotteries were allowed to advertise.[181] The conclusion is problematic for three reasons.

First, the legislature in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*[182] enacted a similar statute which proscribed casino advertising containing similar provisions granting exceptions for other types of traditional forms of gambling.[183] The Supreme Court held that these exceptions did not frustrate the legislature's substantial interest in reducing participation in casino gambling.[184] Rather, the Court agreed with the legislature's belief that the risks

179. *See Valley Broadcasting*, 107 F.3d at 1332 (noting that discouraging participation in games of chance overall is a substantial interest). The government can assert numerous interests supporting its regulation. *See, e.g.*, Rubin v. Coors Brewing Co., 514 U.S. 476, 483 (1995). Only one interest has to pass the *Central Hudson* test in order for the regulation to be constitutional. *See id.* at 485 (recognizing state's interest in promoting temperance while at same time invalidating state's interest in preserving state authority under Twenty-first Amendment). *See also* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 568 (1986) (recognizing government's interest in energy conservation while disregarding government's interest in stabilizing energy price).

180. *See* 18 U.S.C. §§ 1307(a)(1), 1307(b)(1) (1997) (amending federal anti-lottery statute to allow for state-run lottery advertising); 25 U.S.C. § 2720 (1997) (exempting Indian tribes from Broadcasting Act's proscription on advertising commercial lotteries); 18 U.S.C. § 1307(a) (1997) (allowing not-for-profit and governmental organizations to advertise lotteries); 18 U.S.C. § 1307(a) (lifting advertising restrictions on lotteries conducted as promotional activity by commercial organization if ancillary to primary business of organization); 18 U.S.C. § 1305 (1997) (exempting fishing non-profit organizations from lottery prohibition).

181. *See Valley Broadcasting*, 107 F.3d 1334. While the court felt all of the exceptions to the Broadcasting Act undermined its objectives, it was particularly concerned with the exception given to Indian tribe reservations and state lotteries. *See id.* at 1336.

182. 478 U.S. 328, 342 (1986).

183. *See Posadas*, 478 U.S. at 342. For example, advertisers in *Posadas* were allowed to advertise horse racing, cockfighting and the Puerto Rico lottery. *See id.*

184. *See id.*

associated with casino gambling were more destructive than the risks associated with other more traditional types of gambling.[185]

Second, the court in *Valley Broadcasting* did not accord the Broadcasting Act the same judicial deference it gave other acts regulating commercial speech.[186] For example, in *Posadas*, the Supreme Court stated that Puerto Rico's belief that its act restricting casino advertising would decrease the demand among Puerto Rico residents was reasonable.[187] In *Valley Broadcating*, the court agreed that advertising would increase demand in casino gambling.[188] Unlike *Posadas*, however, it did not give the Broadcasting Act heightened judicial deference.[189]

---

185. *See id.* The Court stated, "[w]hether other kinds of gambling are advertised in Puerto Rico or not, the restrictions on advertising of casino gambling 'directly advance' the legislature's interest in reducing demand for games of chance." *Id.* Moreover, the Court reasoned that the legislature's interest was not to reduce demand for all types of gambling but just for casino gambling. *See Posadas*, 478 U.S. at 342.

186. *See generally* United States v. Edge Broad. Co., 509 U.S. 418, 436 (1993) (holding that Broadcasting Act regulated commercial free speech in manner that did not violate First Amendment); *Posadas*, 478 U.S. 328, 348 (1986) (allowing Puerto Rico to enact statute that prohibited commercials advertising casino gambling); City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 54 (1986) (giving city freedom to enact ordinance restricting location of theaters); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637-38 n.7 (1985) (concluding that Ohio's ban on advertising of legal services did not place restrictions on appellant's right to express opinions regarding Dalkon Shield); *see also* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

187. *See Posadas*, 478 U.S. 328, 341. The Court stated:

> The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one, and the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view.

Id. But see, Kurland, *Twas Pitiful, Twas Wondrous Pitiful*, 1986 S. Ct. Rev. 1, 12-15 (1986) (calling decision in *Posadas* "gross perversion" of First Amendment law).

188. *See* Valley Broad. Co. v. United States, 107 F.3d at 1334 (9th Cir. 1997) (noting that common sense suggests that advertising of gambling increases participation).

189. *See id.* at 1335. While it cannot be disputed that *Posadas* has been called into question by several Supreme Court justices, it has yet to be overruled. *See* 44 Liquormart v. Rhode Island, 116 S. Ct. 1495, 1511 (1996). In *Liquormart*, Justice Stevens, joined by three other members of the Court, stated, "we are now persuaded that *Posadas* erroneously performed the First Amendment analysis . . . . Given our longstanding hostility to *commercial* speech regulation . . . , *Posadas* clearly erred in concluding that it was 'up to the legislature' to choose suppression over a less speech-restrictive policy." *Id.* at 1511 (emphasis added). In cases where no single rationale marshals the assent of five justices, "the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest ground." Marks v. United States, 430 U.S. 188, 193 (1977). Applying this rule, *Liquormart* stood for the proposition that regulations attempting to keep alcohol prices high and consumption low were too broad a

Third, the exceptions in the Broadcasting Act did not undermine the Act's stated objectives. The court in *Valley Broadcasting* believed that allowing state lotteries and Indian gaming reservations to advertise frustrated the government's interest in reducing societal ills.[190] The court, however, ignored empirical evidence showing that state lotteries and Tribal gaming, unlike casino gambling, are not fraught with abuse, fraud and social ills.[191] To be sure, when Congress amended the Broadcasting Act to allow for state-run lotteries, it was well aware of the abuses that existed in the private lottery schemes of the past.[192] In particular, Congress was concerned that organized crime would infiltrate state-run lotteries.[193] These fears, however, were quelled upon hearing evidence that state-run lotteries employ procedures which prevent such tampering.[194] Moreover, studies demonstrate that state-run lotteries do

prohibition on speech to be justified. *See Liquormart*, 116 S. Ct. at 1495. It did not, however, overrule *Posadas*. *See* Anheuser-Busch, Inc. v. Schmoke, 101 F.3d 325, 328 (4th Cir. 1996) (Anheuser-Busch II).

Interestingly, in *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995) (Anheuser-Busch I), the Fourth Circuit upheld a statute that prohibited the placement of stationary, outdoor signs that advertised alcoholic beverages in parts of Baltimore City. *See id.* at 1317. The purpose behind the ordinance was to promote the general welfare and temperance of minors exposed to alcoholic beverage advertising. *See id.* at 1314-17. The appellate court held that the statute passed the four-prong *Central Hudson* test because there was a "definite correlation between alcoholic beverage advertising and underage drinking." *Id.* It also held that the regulation of commercial speech is not more extensive than necessary to serve the governmental interest. *See id.* Shortly after this decision, *Liquormart* was decided. A week later, the Supreme Court vacated *Anheuser-Busch I* in light of *Liquormart* and remanded it back to the court of appeals for further consideration. *See* Anheuser-Busch, Inc. v. Schmoke, 116 S. Ct. 1821 (1996). After reconsidering its earlier decision, the Fourth Circuit reaffirmed its earlier decision. *See Anheuser-Busch II*, 101 F.3d 325, 329 (4th Cir. 1996). Noting that Baltimore's ordinance did not prevent alcoholic beverage companies from advertising in other mediums such as direct mail, newspapers and magazines, the court held that Baltimore's legislation was not too restrictive. *See id.* at 329.

190. *See Valley Broadcasting*, 107 F.3d at 1335.

191. *See, e.g.*, H.R. REP. NO. 93-1517 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7007; S. REP. NO. 466, (1988) (Senate Indian Gaming Report).

192. See H.R. REP. NO. 93-1517. For a discussion of the historical concern over corruption that existed in private lotteries, see *supra* notes 41-49 and accompanying text.

193. *See generally* H.R. REP. No. 93-1517, at 6.

194. *See id.* One obvious reason why state lotteries have not been plagued with the same fraud as casino gambling is because almost all of the revenue generated from state lotteries goes to the states to fund public projects. *See id.* However, as evidenced from early lotteries, this alone does not immunize a lottery from abuse. *See, e.g.*, WEINSTEIN & DEITCH, *supra* note 1, at 8. As technology advanced, however, states used more sophisticated systems to ensure better accounting of lottery proceeds, thus minimizing abuse. *See* H.R. REP. No. 93-1517. For instance, in each state, all tickets are accounted for at all times by a central computer with a dual auditing system that tracks the flow of lottery revenue at each step of the

not cause the same negative externalities as casino gambling.[195] For example, a recent study showed that sixty-six percent of gamblers in Minnesota attributed their problems to casino gambling while only five percent attributed their gambling addiction to state lotteries.[196]

Similarly, Congress enacted the Indian Gaming Act because it wanted to accommodate the interest of the nation's Indian tribes[197] while simultaneously responding to concerns about potential criminal infiltration and other insidious problems associated with casino gambling.[198] Unlike casino gambling, there has been no evidence that organized crime has infiltrated Indian gaming.[199] In addition, the Gaming Act ensures that the revenues derived from Indian gambling, unlike those of private casino gambling, are used solely for public purposes.[200] In sum, these exceptions to the Broadcasting Act do not frustrate the government's stated interest because they do not create the severe adverse affects associated with casino gambling.[201] Thus, a better result would have been to uphold the

operation. *See id.* Moreover, lottery tickets are distributed to agents who are licensed by the state after "careful scrutiny." *Id.*

195. *See* Henry R. LeSieur, *Compulsive Gambling*, SOCIETY, May/June 1992, at 44. For example, studies demonstrate that compulsive casino gamblers are between 5 and 10 times more likely to commit suicide. *See id.* Furthermore, a 1981 report estimates that $11,200 is lost annually in productivity costs per pathological gambler. *See* ROBERT M. POLITZER ET AL., COMPULSIVE GAMBLING COUNSELING CENTER, JOHNS HOPKINS UNIV., REPORT ON THE SOCIETAL COST OF PATHOLOGICAL GAMBLING AND THE COST-BENEFIT/EFFECTIVENESS OF TREATMENT (1981) (presented at the Fifth National Conference on Gambling and Risk Taking, Oct. 22-25, 1981). On the other hand, state-lotteries are a profitable state enterprise having very little financial effect on an ordinary person's pocketbook. *See* H.R. REP. NO. 93-1517, at 7 (1974). Studies show that the average family participating in state lotteries only spends about $10 dollars annually. *See id.*

196. *See* Chris Ison, *Dead Broke*, MINNEAPOLIS STAR TRIB., Dec. 3, 1995, at A18.

197. *See* S. REP. NO. 1404 (1974). The purpose of Indian gaming was to raise tribal revenues for member services. *See id.*

198. *See* Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701-2721 (1997)). This act tightened the government's oversight of Indian gambling by subjecting certain types of gambling to direct federal regulation and subjecting other types of gambling to regulatory compacts between Indian tribes and states. *See id.* §§ 2704-2706.

199. *See* S. REP. NO. 1404. Senator John McCain noted that there has never been one proven case of organized criminal activity in the fifteen-year history of Indian gaming. *See id.* Moreover, a commission was created pursuant to the Indian Gaming Act empowered to: 1) monitor gaming activities; 2) inspect gaming premises; 3) conduct background investigations; 4) demand access to records related to gaming; 5) hold hearings; and 6) promulgate rules and regulations in order to carry out the provisions of the Indian Gaming Act. *See id.*

200. *See* 25 U.S.C. at § 2710(b)(2)(B), (d)(1)(A)(ii), (d)(2)(A) (1997).

201. Moreover, it is puzzling that the Ninth Circuit believed these exceptions invalidated the Broadcasting Act because they, like most statutory exceptions, are granted out of a concern that rigid statutes may be an unconstitutional, blanket

constitutionality of the Broadcasting Act using the *Central Hudson* test.[202]

VI. IMPACT

The decision in *Valley Broadcasting* abrogated the legislature's freedom to regulate casino advertising. The Supreme Court, however, has made clear in the past that legislative decisions must be accorded some deference with respect to regulating commercial speech.[203] In *Valley Broadcasting*, this legislative deference should have been even greater because Congress possesses more latitude to regulate broadcasting than other forms of communication.[204] Instead, the court in *Valley Broadcasting* stripped the government of all its power to regulate casino advertising, a power the government had possessed for over sixty years.

The decision in *Valley Broadcasting* will give casinos across America carte blanche authority to advertise casino gambling with impunity. As the *Valley Broadcasting* court suggested, casino advertising increases the demand for gambling.[205] History has repeatedly demonstrated that unfettered gambling produces fraud, abuse and crime.[206] Furthermore, recent studies show that casino gambling

---

prohibition against truthful commercial speech. *See, e.g.*, 44 Liquormart v. Rhode Island, 116 S. Ct. 1495, 1510 (1996) (statutory ban against advertising of retail prices of alcoholic beverages was unconstitutional, blanket prohibition of First Amendment speech).

202. Because the court in *Valley Broadcasting* believed the Broadcasting Act was unconstitutional under the third prong of the *Central Hudson* test, it did not evaluate the act under the fourth prong. *See Valley Broadcasting*, 107 F.3d at 1336 n.9. The fourth prong, however, is analyzed in conjunction with the third prong. *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 486 (1995) ("[t]he last two steps of the *Central Hudson* analysis basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends."). Thus, this Note will not repeat the same arguments it did under step three of the *Central Hudson* analysis. It is clear, however, that the government in *Valley Broadcasting* satisfied the fourth prong of the test. In order to demonstrate a reasonable fit as required by *Posadas*, the government must proffer evidence that its regulation will advance its interest to a "material degree." *See* Edenfield v. Fane, 507 U.S. 761, 769 (1993). As explained under step three of the *Central Hudson* analysis, the government has proffered this evidence. *See, e.g.*, H.R. REP. NO. 93-1517 (1974), *reprinted in* U.S.C.C.A.N. 7007 (1974); S. REP. NO. 466, (1988) (showing that Broadcasting Act will decrease social ills associated with commercial lotteries).

203. *See Edge*, 509 U.S. at 431 (stating that within general bounds of Constitution, Court gives legislature deference when legislature regulates commercial speech).

204. *See id.* at 424.

205. *See Valley Broadcasting*, 107 F.3d at 1334.

206. *See, e.g.*, Blakey and Kurland, *supra* note 1 at 10-11 (discussing scandals which led to abolition of lotteries during 19th century).

produces "negative externalities."[207] For instance, cities and states that allow casino gambling have to pay more to retain additional law enforcement, street cleaners, and extra social services because of family acrimony.[208] Moreover, studies have demonstrated that states permitting casino gambling, like Nevada, have the highest number of suicides, crimes, and high school drop-outs in the country.[209] The decision in *Valley Broadcasting* allows casinos to advertise anywhere in the country. Consequently, these advertisements can reach any adult or child who has access to a television or radio, even if that person lives in a state which prohibits gambling. These advertisements will undoubtedly increase local demand for casino gambling and create the same adverse affects Congress was concerned about when it enacted the Broadcasting Act.

Furthermore, it is no coincidence that casino gambling and organized crime are inextricably linked.[210] There is little doubt that organized crime continues to promote criminal activity.[211] The mafia has long been a player in the casino industry and recent studies show that its presence is still strong.[212] Now that the Ninth Circuit has stripped the FCC's power to regulate casino advertising, the mafia's unprecedented success will continue at the expense of American citizens.

David Jones

---

207. *A Busted Flush: How America's Love Affair with Casino Gambling Turned to Disillusionment,* THE ECONOMIST, Jan. 25, 1997, at 26 ("Casinos do not stimulate local economies as predicted, but actually increase costs."). *See generally* William A. Galston & David Wasserman, *Gambling Away Our Moral Capital,* THE PUB. INTEREST, Spring 1996, at 58 ("The rise in the popularity of gambling not only reflects but also reinforces a loss of confidence in hard work as a source of social advancement.").

208. *See A Busted Flush: How America's Love Affair with Casino Gambling Turned to Disillusionment, supra* note 207, at 34. Further, a 1990 study estimated that 50,000 serious gamblers accounted for $1.5 billion in lost productivity, unpaid state taxes, money embezzled and other losses. *See id.*

209. *See id.* at 35. *See also* Tom Price, *The Mounting Stakes of Our Casino Economy,* CHRISTIANITY TODAY, Apr. 8, 1996, at 98 (demonstrating correlation between increase in Mississippi casinos and state's crime rate).

210. *See Valley Broadcasting,* 107 F.3d at 1332 (1997).

211. *See id.* (discussing how organized crime uses casinos to launder proceeds from narcotics trafficking and skims money from casino gambling operations).

212. *See* 7 *President's Commission on Organized Crime, Hearings on Organized Crime And Gambling vi,* 617, (June 1985) (noting connection between casino employees and organized crime).